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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968.

No. 32

GALE H. JOHNSON,

Petitioner,

vs.

JOHN E. BENNETT, WARDEN, IOWA STATE PENITENTIARY,

Respondent.

REPLY BRIEF FOR PETITIONER.

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INDEX.

PAGE

Argument:

A. State Suppression of Evidence and Employment of False Documents 1

B. Placing the Burden of Proof on the Accused in a Criminal Case 12

Conclusion 18

CITATIONS.

Anderson v. Nelson, 88 Sup. Ct. 1133 19

Barbee v. Warden, Maryland Penitentiary, 331 F. 2d 842 2

Berger v. United States, 295 U. S. 78 11

Brady v. Maryland, 373 U. S. 83 ..... 6, 9

Chapman v. California, 386 U. S. 18 ..... 18, 19

Evans v. Kropp, 254 F. Supp. 218 3

Fay v. Noia, 372 U. S. 391 17

Giles v. Maryland, 386 U. S. 66 ..... 5, 7

Glover v. United States, 147 Fed. 426 16

Ingram v. Peyton, 367 F. 2d 933 7

In re Urbasek, 232 N. E. 2d 716 18

Jones County v. Linn County, 68 Iowa 63, 25 N. W. 930. 6

Levin v. Katzenbach, 363 F. 2d 287 7

Luna v. Beto, 391 F. 2d 329 ..... 3, 11

McMullen v. Maxwell, 209 N. E. 2d 449 11

McNamara v. People, 48 Pac. 541 16

Miller v. Pate, 386 U. S. 1 11

Morrison v. California, 291 U. S. 82 18

Napue v. Illinois, 360 U. S. 264 4

People v. District Court, 439 P. 2d 741 18
People v. Pearson, 169 N. E. 2d 252 12
People v. Robertson, 190 N. E. 2d 19 3
Rochin v. California, 342 U. S. 165 7
Speiser v. Randall, 357 U. S. 513 18
State v. Johnson, 221 Iowa 8, 264 N. W. 596 12
State v. LaMar, 151 N. W. 2d 496 12
State v. Post, 123 N. W. 2d 11 14
Stump v. Bennett, 398 F. 2d 111 ..... 13, 14, 15, 16
Talty v. Lusk, 4 Iowa (Cole) 469 16
United States v. Consolidated Laundries Corp., 291 F. 2d 563 7
United States v. Costanzo, 395 F. 2d 441 18
United States v. Keogh, 391 F. 2d 138 ..... 2, 3, 4, 8
Wheelock v. Madison County, 75 Iowa 147, 39 N. W. 243 6

LAW REVIEWS.

Comment, 51 Iowa L. Rev. 714 8
Everett, Discovery in Criminal Cases, 1964 Duke L. J. 477 11
Fletcher, Two Kinds of Legal Rules, 77 Yale L. J. 880. 18
Levy, Justice—After Trial, 11 N. Y. L. For. 240 ..... 2, 7
Note, 81 Harv. L. Rev. 1260 ..... 3, 18

MISCELLANEOUS.

98 C. J. S. Witnesses § 460 8
Shadoan, Trial Tactics 3
3 Wharton, Criminal Evidence (12th ed. 1955) 8

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ARGUMENT.

A. THE PROSECUTION'S SUPPRESSION OF MATERIAL EVIDENCE AND EMPLOYMENT AT TRIAL OF FALSE DOCUMENTS DEPRIVED PETITIONER'S CONVICTION OF ITS DUE PROCESS BASE.

There is no dispute in this case over the fact that a requested defense witness was held in jail during the term of petitioner's trial. With appreciated candor the respondent so states in the opening sentence of respondent's argument (Resp. br. 7). No explanation is proffered for the state's incarceration and subsequent deception with respect to the witness (Resp. br. 7; A. 77). Respondent urges, however, that this incredible conduct by the state

should not be considered violative of the petitioner's constitutional rights. In taking this position, respondent first points out that where suppression of evidence is deliberate the courts readily overturn the conviction and do not tarry to weigh the materiality of the suppressed evidence (Resp. br. 8, citing *United States* v. *Keogh,* 391 F. 2d 138, 148). But, urges the respondent, the instant cause is not one of this class of cases because of lack of proof that the prosecutor himself participated with the sheriff in the suppression. The argument overlooks the point that deliberate suppression of evidence opprobrious to the due process clause may be perpetrated either by the prosecutor or other law enforcement officials.

This principle was carefully set forth in petitioner's brief on the merits (Pet. br. 10-11), citing *Barbee* v. *Warden, Maryland Penitentiary,* 331 F. 2d 842. To this reasoning respondent made no reply except to repeat the assertion that absent proof of knowledge or intrigue by the prosecutor himself, there is no constitutionally cognizable suppression. This view overlooks the consistent line of cases which condemn suppression by the prosecutor or other law enforcement officials. As stated in *Barbee,* "The police are also part of the prosecution. . . ." 331 F. 2d at 846. Could it be seriously contended that a confession might be brutalized from an accused by sheriff's deputies either in the county of trial or another, and because the prosecutor trying the case did not assist in the brutality the confession is admissible? The guiding principles in the suppression area are well stated in Levy, *Justice—After Trial,* 11 N. Y. L. For. 240, 292 (1965):

> The courts have never made any distinction between whether the prosecution or the police knew the facts that proved the perjury or suppression; it being held that the prosecution is charged with knowledge which it should have known. That police action in suppressing is state action violative of due process would also

> seem apparent since the prohibitions of the due process clause are addressed to the state: it thus makes no difference which agency of the state violated due process; and because acts of police officers may violate the Constitution, while the Constitution protects only against state action. Constitutional responsibilities may not be avoided by carving out small units.

See *People* v. *Robertson,* 190 N. E. 2d 19, 21 (N. Y. Ct. App. 1963); *Evans* v. *Kropp,* 254 F. Supp. 218, 220-21; *Luna* v. *Beto,* 391 F. 2d 329, 332; Shadoan, Trial Tactics, 21, 29 (Trial Lawyers Serv. Co., 1966).

If, as suggested by the respondent as well as significant case authority, materiality of the suppressed evidence is presumed where there has been a deliberate concealment, the instant case would appear to fit within the rule. The Federal District Court below discovered that the imprisoned witness had never been in the mental institution wherein the authorities represented him to be (A. 34). It appears conceded that the requested witness was under lock and key of the very sheriff's office which promulgated the misrepresentation. The Court of Appeals below stated that the evidence on the point established a prima facie case that the sheriff's return was false (A. 77). If the respondent wished to avoid the conclusion that intentional suppression occurred, explanatory evidence should have been produced. The record appears barren of any such explanatory proof, and the state in its brief indicates that it is unaware of the reason that the false statement appeared on the subpoena return (Resp. br. 7). These circumstances present a fact situation wherein our courts have invalidated convictions without major inquiry as to the materiality of the suppressed evidence. *United States* v. *Keogh,* 391 F. 2d 138, 147-48; Note, 81 Harv. L. Rev. 1260, 1273-75 (1968). The high purpose to be served by such an invalidation rule is found in the need for and salu-

tary desire of our legal system to protect the integrity of the judicial process.[1]

While the instant case appears to merit invocation of the above principles, petitioner in no way implies by urging the point that the requested witness was non-material. Indeed, Thomas Orsucci occupied a central role in the events which took place in 1934. There is evidence that the authorities announced in advance of trial that Orsucci was with the petitioner in a nearby "beer tavern" the night prior to the offense (A. 133). Further, evidence indicates that one of the two key state witnesses near the scene of the offense made an identification of Orsucci. The identification appears to have been made with sufficient certitude to result in Orsucci's arrest for murder (A. 133). He was held on this charge for some five weeks. Ultimately, the authorities apparently satisfied themselves that the identification was incorrect (A. 134).[2] Among other matters, Orsucci's recounting at trial of the erroneous identification made by a state witness whose credibility was absolutely crucial to the prosecution would be highly relevant in the jury's assessment of such witness' credibility. In *Napue* v. *Illinois*, 360 U. S. 264, 269, this court indicated that credibility may well be the critical factor in a given case. "The

1. *United States* v. *Keogh*, cited above, discusses both deliberate suppression cases and those wherein the defendant requested specified evidence. The decision indicates that the request cases stand upon "special footing," the fact of the request being accorded peculiar weight. Failure to appreciate the use to which the defense could put the evidence is no excuse, and convictions obtained where an appropriate defense request has not been honored should be invalidated even on a fairly low showing of materiality.

2. Appendix page 133 above cited refers to matter in Pet. Ex. 20, H. R. 157; Appendix page 134 cited above refers to matter in Pet. Ex. 23, H. R. 158. Petitioner notes a reproduction error in connection with Pet. Ex. 23 at A. 134. Line four at that page correctly reads "... have checked his story ..." and not "history" as printed in the appendix.

jury's estimate of the truthfulness and reliability of a given witness may well be determinative of guilt or innocence. . . ." In *Giles* v. *Maryland,* 386 U. S. 66, 70 the court made the point again. "The credibility of the witnesses was thus important to the outcome of the case."

Where a case requires appraisal of the materiality of the suppressed evidence, various relevant suggestions appear in *Giles* to determine the dimensions of the suppression. In the opinion written by Mr. Justice Harlan, he points out that the standard in certain Supreme Court cases has been whether the testimony may have had an effect on the outcome of the trial. 386 U. S. at 116. The evidence here may well have had just such an effect.[3] Mr. Justice Fortas pointed out that no respectable interest of the state is served by its concealment of information which is material, generously conceived, to the case. 386 U. S. at 98. Under either view the evidence here appears material. This conclusion is supported by the trial court's issuance of a subpoena order for the requested witness (A. 94). As indicated previously by petitioner (Pet. br. 12-13), Iowa law required the trial judge to be satisfied that such witness was "material and necessary" prior to authorizing a defense subpoena at state expense.

The respondent recognized such fact, but suggests with-

3. Arrayed against the two state witnesses were several defense witnesses who placed the petitioner 165 miles from the scene of the offense at or near the time of its commission (see, *e.g.*, A. 103, 105). In these circumstances, the reliability of each of the state's witnesses was important, and prior observational errors on key matters were extremely relevant. Mr. Justice Harlan stated in *Giles* that the charges there were convincingly proved. It is perhaps well to point out that the record here discloses no evidence of a confession having ever been obtained by the police, and the available newspaper accounts of the period indicate affirmatively to the contrary on this point. While he did not take the stand at his original trial, Mr. Johnson's claim of not guilty appears to have been consistently maintained from his plea in the 1934 prosecution through his emphatic statements in the present proceeding (Federal District Court Habeas Corpus transcript 87).

out citation to authority that the definition of "material" as utilized by this court in *Brady* v. *Maryland*, 373 U. S. 83, is considerably more limited than the Iowa statute contemplated (Resp. br. 8). The history of this statute demonstrates that its purpose was to prevent the summoning of witnesses whose testimony was not necessary in the trial of the case. *Wheelock* v. *Madison County*, 75 Iowa 147, 39 N. W. 243 (1888); *Jones County* v. *Linn County*, 68 Iowa 63, 65, 25 N. W. 930, 931 (1885).[4] It thus appears that the Iowa statute at the time of petitioner's trial imposed a more stringent standard respecting materiality than that contemplated in *Brady* v. *Maryland*. Indeed, the witness must have been "necessary" to the trial of the case in order to be subpoenaed under the statute. Respondent's present arguments should have been addressed to the trial court in 1934 prior to issuance of the subpoena if the state wished to contest the need for Orsucci's testimony. No such challenge appears in the record.

Although the petitioner has touched upon the issue of materiality at some length, it should be kept in mind that this is not a case of a prosecutor who simply overlooked a matter in his briefcase which was potentially helpful to the defense. The instant cause presents a defendant who specifically requested an available witness, and whose request was approved by the court. The false return by the sheriff's office in these circumstances poses a case of suppression wherein the materiality of the sought evidence moves to a position of secondary importance and the integrity of the judicial process occupies center stage. In these instances the courts have promptly granted relief, refusing to countenance official acts which collide with fun-

4. As stated in the *Wheelock* case, the intention of the statute was that the county was to be liable for the fees of such witnesses only as should be material to the defense, and the question of materiality was to be determined by the order of the court directing that the subpoenas issue.

damental notions of decency and fairness. Due process of law has long required that ". . . States in their prosecutions respect certain decencies of civilized conduct." *Rochin* v. *California*, 342 U. S. 165, 173.[5]

Two final points raised by respondent require brief mention. First, respondent asserts lack of diligence by the petitioner in failing to preserve Orsucci's testimony by way of deposition prior to Orsucci's death. This assertion overlooks the prisoner's numerous frustrated attempts to obtain habeas corpus hearings to spread Orsucci's testimony on the record, many of these efforts occurring prior to the demise of the witness in 1965 (A. 9-10, 25). The record demonstrates that the prisoner tried in every way he knew how to bring the matter on for hearing. To urge that the petitioner be penalized for any alleged failures to produce Orsucci's testimony appears especially unseemly in view of the state's consistent resistance to providing a hearing on these claims (see, *e.g.*, A. 23).

Respondent pointed to the fact that during the cross-examination of the state's two key trial witnesses, little was made of the earlier identification of Orsucci by one of these witnesses (Resp. br. 9). At this time it is difficult to condemn petitioner's trial attorneys for their failure to explore the area more fully when it is remembered that they had been erroneously informed that the leading defense witness on the point was unavailable for trial. Denials

5. Mr. Justice Fortas, in *Giles* v. *Maryland*, 386 U. S. 66, 101, points out that a supportable conviction "requires something more than that the state did not lie." In view of the record here (see A. 77), petitioner's conviction does not appear free even from that minimal infirmity. Respondent now suggests that the sheriff's erroneous return may have been the product of oversight. Petitioner points out that such contention does not save the respondent. See *Ingram* v. *Peyton*, 367 F. 2d 933, 936 (invalidating 18 year-old conviction); *Levin* v. *Katzenbach*, 363 F. 2d 287, 290 (collecting numerous cases); *United States* v. *Consolidated Laundries Corp.*, 291 F. 2d 563, 570; Levy, *Justice—After Trial*, 11 N. Y. L. For. 240, 293 (1965).

of the faulty identification by the involved state witness would have stood virtually uncontradicted without Orsucci to back up the defense position. Doubtless the trial strategy would have been altered with Mr. Orsucci present.[6] The point is that the accused was forced to trial without a witness he was rightfully due. All of the objections raised by the respondent could have been resolved had the state simply done the right thing and produced the witness as requested, and as ordered by the trial court. Exactly what Orsucci would have said, the effect of his evidence on the credibility of the state's witnesses, the impact of his testimony upon the jury—all of these questions would have been amply answered had defendant's right to secure witnesses been protected by the state. The subversion of this right, one critical to the defense in a judicial system premised on the adversary concept,[7] resulted in the situation presented in this case. The respondent now attempts to use the state's prior wrongdoing as a sword, urging that the burdens flowing from suppression of the witness' testimony fall upon the shoulders of the defendant instead of its rightful place, the party which was responsible for this situation. As concluded by Judge Friendly in *United States* v. *Keogh*, 391 F. 2d 138, 147, appropriate defense requests for available evidence are entitled to "peculiar

6. On the general admissibility of impeaching evidence in criminal cases, see 3 Wharton, Criminal Evidence § 903 (12th ed. 1955) ("Generally, any fact or circumstance tending in the least to discredit a witness is admissible to impeach him, and a party, especially the accused, is entitled to all the evidence in a case legitimately bearing upon the question of the veracity of a witness of the opposite party."); 98 C. J. S. Witnesses § 460, page 323 (Anything having a tendency "to throw light on the accuracy, truthfulness, and sincerity of a witness may be shown and considered in determining the credit to be accorded his testimony.").

7. Comment, 51 Iowa L. Rev. 714-15 (1966). Should the procedure in this case seem fair to the respondent, petitioner ponders how the state would react if the accused were permitted to review the list of proposed state witnesses, then select a witness from the list and lock him up for the duration of the trial.

weight." After pointing out that *Brady* v. *Maryland* had eliminated the issue of good faith when a suitable request has been made, the opinion stated:

> The request cases also stand on a special footing; the prosecution knows of the defense's interest and, if it failed to honor this even in good faith, it has only itself to blame. 138 F. 2d at 148.

Petitioner urges that false documents were employed in the prosecution's effort to secure his conviction. The Court of Appeals below ruled that a conviction based upon false evidence could not be overturned except where proof demonstrated that the prosecutor knew the evidence was false at the time of trial (A. 75). Petitioner's brief on the merits cited significant case authority which reflected the inaccuracy of the court's conclusion in this regard (Pet. br. 15-17), and the respondent does not appear to defend this view expressed by the Court of Appeals. Rather, the respondent attacks petitioner's basic premise that the involved documents were false. Apparently the respondent relies upon the old trial evidence to the effect that the petitioner wrote the subject instruments. The position is remarkable in view of the respondent's previous admission that it was error for the state to introduce the documents (A. 56).[8] Respondent now urges that this prior admission was improper for respondent to make because it was not supported by proof (Resp. br. 13). The last statement seems unusual because of the analysis of the challenged documents accomplished by the state's own handwriting expert in 1966, fully a part of the record in this case (Resp. Ex. 2, A. 128; H. R. 197). This evidence alone would provide ample support for the admission of error contained in respondent's trial brief. But further, a leading au-

8. In addition, respondent referred to the challenged documents as "the questionable notes" in the Court of Appeals below. Resp. br. 10, U. S. Ct. of Appeals.

thority on the subject has stated unequivocally that in his opinion the petitioner did not author the inculpatory notes introduced by the prosecution as state's exhibits 1 and 2 at the 1934 trial.[9]

The two felons who produced the "questionable notes" for the state also testified to hearing the petitioner admit his guilt of the offense charged to a third prisoner (A. 89). This testimony was sharply challenged by the third prisoner (A. 106-7), as well as prison officials who testified on behalf of the defense that Gale Johnson was under guard at all times prior to trial, and the guards were given strict orders to permit no conversation with him (T. R. 260-61, 264, 270-71). An affidavit of the prisoner's guard supports the position that no such conversation took place (Pet. Ex. 8, H. R. 83-84). Petitioner urges that recent evidence demonstrates beyond serious question the falsity of the challenged notes. Had this information been available at trial, not only would the notes have been destroyed as effective evidence for the state, but the fact that forgeries had been prepared would have reflected adversely on the whole of the testimony provided by the two producing felons. Well-reasoned authority indicates that where the prosecutor has cause to believe that evidence may be false, he should make available to the defense the means to discover the falsity. Further, where evidence of the magnitude of the documents introduced here is later demonstrated to be false, reason indicates that unfairness occurred in the

9. Professor Winsor C. Moore, who testified to this effect at petitioner's habeas corpus trial, has written widely in the field of document examination. A partial list of his publications includes *Testimony of the Expert Document Examiner,* 22 U. Pitt. L. Rev. 675 (1961); *Cross Examining the Incompetent Document Examiner,* 1 Washburn L. J. 533 (1963); *Suspicious Documents,* 6 Prac. Lawyer, v. 1, p. 39 (1960); *Anonymous Writing: Methods Used to Evade Identity,* 13 Neb. B. J. 5 (1964); *Age Determination of a Document,* 14 Neb. B. J. 118 (1965); *The Questioned Typewritten Document,* 43 Minn. L. Rev. 727 (1959).

trial of the accused.[10] Relying upon *Jones* v. *Commonwealth,* 97 F. 2d 335, a Federal court in *United States* v. *Ragen,* 86 F. Supp. 382, freed a prisoner 25 years after his original conviction, and summarized as follows:

> The facts in this case present a situation almost identical with that before the court in the case of *Jones* v. *Commonwealth of Kentucky,* 6 Cir., 97 F. 2d 335. In both cases, petitioners were convicted and have served a substantial portion of their lives in the penitentiary. In both cases the perjury at the trial was first discovered by the convicted persons many years after the trial. In both cases the perjured testimony was vital to the prosecution's case. . . . In a case of this nature one would not expect to find direct proof of the connivance of the prosecution in the use of perjured testimony, and the circumstantial evidence presented is as strong as could reasonably be expected. However, even if this evidence of knowing use of perjured testimony was not in the case, I believe that even on the authority of the *Jones* case, this petitioner should be discharged. 86 F. Supp. at 390.

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10. See *McMullen* v. *Maxwell,* 209 N. E. 2d 449, in connection with trial testimony in the 1934 trial transcript record 285, 302, 311; *Luna* v. *Beto,* 391 F. 2d 329; Annotation, 7 A. L. R. 3rd 8, 32.

Perhaps it is not entirely surprising that such notes were created. The record contains testimony respecting offered pecuniary inducements to those who were willing to assist the state (A. 107, 109-110). Respondent seems to challenge the petitioner to bring the instant case within the "knowing use of false evidence" rule of *Miller* v. *Pate,* 386 U. S. 1 (Resp. br. 14). While it is not necessary to do so in order to invalidate the instant conviction, it is noteworthy here that *Miller* v. *Pate* expresses one facet of a broad and wise principle, the historic concept that the prosecutor's primary duty is not to convict but to see that justice is done. The Supreme Court explained many years ago in *Berger* v. *United States,* 295 U. S. 78, 88, that it is a prosecutor's duty to refrain from any improper methods calculated to produce a wrongful conviction. See also Everett, *Discovery in Criminal Cases,* 1964 Duke L. J. 477, 511 (1964). If, as the prosecutor's statement in closing argument seems to suggest, the state made the money offer charged by a defense witness (A. 110), activity which is antagonistic to the principles of *Berger* may be indicated.

Finally, respondent suggests that the state may have been obliged to introduce the false notes in order to avoid the error of suppressing evidence (Resp. br. 15). The dichotomy in reasoning posed here is strange. Respondent suggests that a due process violation may be committed when evidence unknown to and unrequested by the accused is not disclosed, yet earlier in the same brief asserted that no such violation occurred when the state suppressed an available witness specifically requested by the accused.

B. PLACING THE BURDEN OF PROOF ON THE ACCUSED RESPECTING A MAJOR ISSUE IN A CRIMINAL CASE IS ANTAGONISTIC TO BASIC CONSTITUTIONAL PRECEPTS.

Both the District Court and the Court of Appeals below found that the burden of persuasion with respect to whether the defendant was absent from the scene at the time of the offense was placed upon the defendant at his trial (A. 42, 79). Inasmuch as the accused had presented proof that he was absent from the scene, the Iowa trial court directed the jury that it was incumbent upon the defendant to prove such fact in order to prevail on this proof (see instruction, A. 94). The findings by the District Court and Court of Appeals below that the burden of proof on the central issue of alibi was thus placed upon the defendant is not at variance with the view of the Iowa Supreme Court in assessing the effect of such an instruction. See *State* v. *Johnson*, 221 Iowa 8, 20, 264 N. W. 596, 602 (1936); *State* v. *LaMar*, 151 N. W. 2d 496, 504 (1967).[11] Respondent

11. The impropriety of placing the burden of proof on the defendant, as the trial court's instruction in this case clearly did, is well set forth by Justice Schaefer in *People* v. *Pearson*, 169 N. E. 2d 252, 255:

> Logically, proof of an alibi is not proof of an affirmative defense because in order to establish its case the prosecution must show that the defendant was present at the scene of the crime, and evidence that the defendant was elsewhere is

does not appear to contest the above findings respecting the thrust of the challenged instruction, and agrees that the burden of proof was placed on the accused. However, respondent refers to this as an "inferior" burden (Resp. br. 15). While the petitioner fails to see how forcing him to carry the burden of persuasion on a central issue in the case saddles him only with an "inferior" burden, it does appear that the issue is narrowed for decision: does a jury charge which requires the accused to prove his non-presence at the scene in order to be acquitted under his claim of non-presence violate any concept of criminal justice? Petitioner contends that the procedure revealed here did precisely that. Well-reasoned authority set forth in petitioner's original brief articulated the manner in which such a jury charge collides with the presumption of innocence and the rule of reasonable doubt, landmark principles in the administration of our criminal law (Pet. br. 19-20).

To these cases respondent made no direct reply, and it is noteworthy that respondent cites to no decision outside of Iowa which adjudicates that such an instruction is constitutionally proper. In fact, all of the cases which the petitioner has discovered treating the alibi issue in a constitutional context strike down such a jury charge. In addition to the authorities previously cited on this point, there should be added the recent case of *Stump* v. *Bennett*, 398 F. 2d 111. This decision comprises a virtual hornbook of relevant authority in the field of the alibi charge. In *Stump* the en banc court invalidated a murder conviction on the basis that the Iowa trial court's instruction cast the burden of proof respecting alibi on the accused, that case

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only one method of negativing the prosecution's case. So where an instruction has unequivocally placed upon a defendant the burden of establishing an alibi, the conviction has been reversed.

involving an instruction which was less detrimental to the accused than the instruction in the present case. See 398 F. 2d at 126. The Court in *Stump* observed that Iowa was one of only two states which now requires a defendant to assume the burden of persuasion by a preponderance of the evidence in establishing alibi. The court indicated the result of this procedure with respect to the defendant's presumption of innocence:

> Upon a plea of alibi, the presumption of innocence is permanently shattered as to the evidence relating to (1) the presence of the defendant, (2) the time, and (3) the place of the crime itself. In *Glover* v. *United States,* 147 F. at 431, this court pointed out that proof of alibi is a denial of the essential elements of the crime. 398 F. 2d at 116.
>
> . . . [W]hen the burden of persuasion is shifted to the defendant to disprove essential elements of a crime, as it was in the instant case, then it is certain that the due process clause of the Fourteenth Amendment has been violated. F. 2d at 118.

Petitioner previously called attention to the anomalous situation which occurs when the accused produces witnesses to establish alibi, as contrasted to the case where this is not done (Pet. br. 21).[12] The Court of Appeals in *Stump* v. *Bennett* saw in this situation a further constitutional defect:

> Beyond violating petitioner's right to have the state assume the burden to prove (beyond a reasonable doubt) his presence at the crime, we think the Iowa instruction and its judicial application is patently offensive in other ways to the defendant's basic constitutional rights. Under the Iowa rule, a defendant pleading alibi faces an anomalous situation. If he does

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12. ". . . it is only when defendant elects to go farther and call witnesses to support his alibi contention that he assumes a burden, *i.e.,* to establish his affirmative allegation or defense." *State* v. *Post,* 123 N. W. 2d 11, 19 (Iowa 1963).

not plead and offer witnesses to corroborate the defense of alibi, the burden of proof never shifts to him and he may rely upon the state's failure to establish his identity and presence beyond a reasonable doubt. . . . It is only when the defendant seeks to produce witnesses to corroborate his non-presence that the Iowa rule incongruously penalizes him with the burden of persuasion as to his non-presence. . . . He must choose between the exercise of two constitutionally guaranteed rights. He must surrender either the right to offer corroborative evidence of his innocence or else his traditional right to have the state assume the burden of proving his guilt beyond a reasonable doubt. Under the Iowa rule he cannot have both. Such a procedure can have no other purpose than to "chill the assertion of constitutional rights by penalizing those who choose to exercise them. . . ." This is an impermissible burden. 398 F. 2d at 120.

The court points to the arbitrary distinction made between accused persons who present witnesses to testify that the accused was absent from the scene of the crime, and defendants who do not. The former are penalized by the requirement that their proof on the point preponderate in order to prevail:

> The Iowa rule offers different procedural protection to those individuals pleading alibi who (1) are unable to produce witnesses to verify their defense or (2) who perhaps may be more willing to forego the production of witnesses to avoid incurring the burden of persuasion as to their innocence. To shift the burden because a particular defendant offering the identical defense happens to be able to present corroborating witnesses, is basically so unreasonable we deem it a patent denial of the equal protection of the laws under the Fourteenth Amendment. There can be no logical rationale behind such an arbitrary distinction. Although on its face the rule may be deemed one of evidence in which a state's procedure is to be given great deference (cf., *Salsburg* v. *Maryland*, 346 U. S. 545 (1954)), neverthe-

> less the denial of rights justified only as a penalty assessed to a defendant calling witnesses to testify on his behalf cannot be deemed a reasonable justification for the rule. 398 F. 2d at 121.

Respondent suggests that other instructions given by the trial court in *State* v. *Johnson* cured any error by that court in delivering the challenged alibi instruction to the jury.[13] Certain other instructions in the case are set forth in the Appendix (A. 95-96). The respondent's proposition overlooks the confusion as to burden of proof created by giving the special alibi instruction, a point made in petitioner's original brief and decisively referred to in the important case of *Glover* v. *United States*, 147 Fed. 426, 433 (Pet. br. 19). A Colorado decision said it well in dealing with the subject point. Deciding that prejudicial error occurred when the defendant was required to prove alibi, the court ruled that an erroneous jury instruction in a criminal case cannot be corrected by another instruction which states the law accurately "unless the erroneous one be plainly withdrawn." *McNamara* v. *People*, 48 Pac. 541, 544 (1897). Respondent intimates that even if the challenged instruction here penalized the defendant for calling witnesses in his behalf, the point of the instruction was lost on the jury because of the other instructional emphasis on presumption of innocence and reasonable doubt. But if the alibi instruction was so unimportant, why did the prosecutor select it alone from this group of instructions to press home to the jury in final argument (A. 113-14)?

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13. *Stump* v. *Bennett* was resolved by a 5-3 decision in the Court of Appeals. In urging the above argument, respondent presses a point made by the dissenting judges in *Stump*. It is noteworthy that this dissent observed that the trial court's instructions in *Stump* were more protective of the defendant's rights than those given in the instant case. 398 F. 2d at 126. The confusion promulgated under the Iowa alibi charge may be further emphasized by the practice of delivering the written instructions to the jury for use during deliberations. Cf., *Talty* v. *Lusk*, 4 Iowa (Cole) 469 (1857).

Respondent concludes by asserting two objections to petitioner's right to raise the question of the alibi instruction here: respondent urges that petitioner's trial counsel failed to take any exception to the challenged instruction, and also that this case is an old one, the trial occurring in 1934 (Resp. br. 19). As to respondent's assertion that there was a "failure to take any exception to the sixteenth instruction," this allegation is conclusively rebutted upon reference to the record. See defendant's exception to instruction 16, 1934 trial transcript record 395. This is not a case wherein trial counsel permitted the court to erroneously instruct, then combed the record for errors. Petitioner's resistance to the challenged instruction was communicated to the trial court and appears as part of the record in this case. Also, simply because petitioner's case is an old one in no way diminishes his right to relief. Indeed the annals of the law are filled with examples of wrongs which are remedied many years later, and the reputation of the law is enhanced mightily by the willingness of our courts to take such necessary corrective action. This brief has chronicled several reported instances wherein this has occurred. Respondent now seeks to deny the petitioner the benefit of a positive ruling by this Court because the precise challenge to the unconstitutional jury charge detailed herein was not raised in 1934. *Fay* v. *Noia*, 372 U. S. 391, makes clear that the Great Writ will provide relief for violations of significant constitutional rights notwithstanding alleged procedural deficiencies. "Surely no fair-minded person will contend that those who have been deprived of their liberty without due process of law ought nevertheless to languish in prison." 372 U. S. at 441.

In closing, petitioner does not seek to proscribe the State of Iowa from establishing reasonable rules of criminal procedure. But when a particular practice which is rejected by the vast majority of jurisdictions operates in a state court

to deprive the accused of certain fundamental rights, the practice must give way. See *Chapman* v. *California,* 386 U. S. 18, 20-21. See also *Morrison* v. *California,* 291 U. S. 82, 93; *Speiser* v. *Randall,* 357 U. S. 513, 525-26. The procedure employed in the petitioner's trial destroyed basic safeguards which are guaranteed all persons accused of crime. "There are a number of fundamental principles of law applicable to criminal cases which have been so universally accepted and applied in this country as to have become component parts of our understanding of the term 'due process of law.' Among such basic concepts we find the doctrine that, at the outset of the trial, an accused person is presumed to be innocent of the offense charged against him; that the state must satisfy the jury of the guilt of the defendant beyond a reasonable doubt; and that if upon any material issue of fact essential to guilt the jury has a reasonable doubt, the defendant is entitled to the benefit of that reasonable doubt and a verdict of not guilty." *People* v. *District Court,* 439 P. 2d 741, 743-44 (Colo. 1968).[14] The procedures employed in petitioner's trial did violence to these basic concepts.

CONCLUSION.

It appears undisputed in this case that a requested defense witness was held in jail during the course of petitioner's trial (Resp. br. 7). The record indicates that the official suppression and concealment of the witness was of such character that the rule of automatic relief should be invoked.[15] If, however, the case is deemed one requiring consideration of the harmless error rules, respondent ap-

14. On the importance of the presumption of innocence and rule of reasonable doubt, see *In re Urbasek,* 232 N. E. 2d 716, 720 (1968); *United States* v. *Costanzo,* 395 F. 2d 441, 445. See also Fletcher, *Two Kinds of Legal Rules,* 77 Yale L. J. 880 n. 2 (1968).

15. See Note, 81 Harv. L. Rev. 1260, 1273-75 (1968).

pears to have misinterpreted the allocation of appropriate burdens. The Supreme Court makes clear in recent decisions on the point that it is the respondent's burden to demonstrate beyond a reasonable doubt that an error is harmless. Once the exclusion of properly requested evidence is established, and in this case such fact appears undisputed, the burden falls on the state to demonstrate that Orsucci's testimony was inconsequential. The record appears barren of such proof. Indeed, the facts point to a contrary conclusion, indicating that he would have been a most important witness. Rather than carry their rightful burden, the respondent challenges the petitioner to make near-impossible demonstrations in order to prevail—demonstrate clear proof of prosecutorial complicity in the deception, demonstrate exactly what Orsucci's trial testimony would have proved, demonstrate a difference in result if the state hadn't suppressed him. The point is that these burdens belong to the state once the original error is established and the respondent has rather totally failed to carry them. Again in connection with the false notes it appears beyond serious question that error occurred when they were employed to secure conviction. In an earlier brief the respondent admitted that the introduction of these notes into evidence was incorrect (A. 56). Under these circumstances the burden should fall upon the respondent to demonstrate that the use of the evidence was harmless error. The difficulties of the respondent making such a showing at all, much less beyond a reasonable doubt, are apparent in view of the extensive testimony dedicated to the false notes upon trial of the case, and the prosecutor's reliance upon same in closing argument (A. 87-89, 110-12; see Pet. original br. 14-15). *Chapman* v. *California,* 386 U. S. 18, sets forth the state's burden to show the error harmless "beyond a reasonable doubt." See also *Anderson* v. *Nelson,* 88 S. Ct. 1133, which applies the *Chapman* rules in habeas corpus.

Finally, the Court of Appeals below, in deciding this case, observed that the great weight of authority rejected the practice of casting the burden of proof on an accused person in the manner disclosed here. Since the accused had produced witnesses to establish his non-presence at the scene of the offense, he was required to bear this burden by a preponderance of the evidence, a point the prosecutor drove home to the jury in closing argument (A. 113-14). The defendant was thus penalized for calling witnesses in his own behalf. The injustice of this procedure has moved courts to strike it down as violative of the accused's presumption of innocence, and more recently, as a denial of equal protection of the laws.

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